IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 705 of 1989
With
FIRST APPEAL No. 706 of 1989
With
FIRST APPEAL No. 707 of 1989

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

MANUBHAI CHHOTALAL PATEL - Appellant(s)
Versus
URVASHIBEN JAYANTILAL JAGIRDAR - Defendant(s)

==========

Appearance :
MR SV RAJU for Appellant(s) : 1,
MR MC SHAH for Defendant(s) : 1,

==========

CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 27/07/2006

COMMON ORAL JUDGMENT

1. As all these appeals are arising out of the common judgment and decree passed by the learned City Civil Court, Ahmedabad, and are

interconnected with respect to the common Will, they are being disposed of by this common judgment and order.

2. The First Appeal No. 705 of 1989 is filed by the appellant – original defendant challenging the judgment and decree passed by the learned City Civil Court, Ahmedabad, dated 30/31st January, 1989 passed in Civil Suit No. 4039 of 1987 in decreeing the said suit by ordering to issue probate to the plaintiff with respect to the suit Will at Exh.57. The First Appeal No. 706 of 1989 is filed by the appellant – original defendant challenging the judgment and decree passed by the learned City Civil Court, Ahmedabad, dated 30/31st January, 1989 passed in Civil Suit No. 1516 of 1985 in decreeing the said suit by ordering to issue permanent injunction to the appellant – original defendant restraining him from disturbing or interfering in any manner the plaintiff's possession of the suit house. The appellant is also restrained from taking its forcible possession from the

original plaintiff. So far as First Appeal No. 707 of 1989 is concerned, it is filed by the appellant – original plaintiff challenging the judgment and decree passed by the learned City Civil Court, Ahmedabad, dated 30/31st January, 1989 passed in Civil Suit No. 4156 of 1985 in dismissing the said suit filed by the appellant.

3. The Civil Suit No. 4039 of 1987 was filed by one Urvashiben Jayantilal Jagirdar (hereinafter referred to as "the plaintiff") in the City Civil Court, Ahmedabad, for a grant of probate with respect to the suit Will in her favour contending inter alia that the deceased Vidyaben Chhotalal Patel executed her Will on 20th October, 1983 and that she has executed no other Will or codicil with respect to her properties and under the said Will (Exh.57), she has bequeathed all her properties to the plaintiff. It was further averred that the said suit Will was duly registered according to law and the deceased – Vidhyaben died on 28th March, 1985. It was also further averred that relying upon the

same, she has become the sole legatee of the deceased under the said suit Will and therefore, it was requested to issue probate in her favour.

The Civil Suit No. 1516 of 1985 was filed by the plaintiff for a permanent injunction restraining the defendant – Manubhai Chhotalal Patel (hereinafter referred to as "the defendant") from taking away possession of the properties described in para – 2 of the plaint. It was averred in the plaint that she has become its owner as a legatee named by the deceased owner thereof in her registered Will executed on 20th October, 1983. It is required to be noted that in the Civil Suit No. 1516 of 1985 the plaintiff claimed the relief on the basis of the registered Will dated 20th October, 1983 for which, she has applied for grant of probate in Civil Suit No. 4039 of 1987.

The Civil Suit No. 4156 of 1985, the counter suit, was filed by the defendant for a declaration that he has become the owner of the

suit house on expiry of his sister i.e Vidhyaben on 28th March, 1985. He has further prayed for a declaration that any Will purported to have been executed by the deceased sister Vidhyaben on 20th October, 1983 is illegal and invalid and any action taken by the plaintiff under the said Will was illegal and invalid. He also further prayed the relief of possession of the entire suit property from the plaintiff. He also prayed for permanent injunction restraining the plaintiff from recovering any rent from the two tenants occupying the ground floor portion of the suit house. He has also prayed for rendition of accounts of rent realized by her from the said tenants after 28th March, 1985.

4. The suits filed by the plaintiff – Urvashiben Jayantilal Jagirdar i.e. Civil Suit Nos. 4039 of 1987 and 1516 of 1985 were resisted by the defendant – Manubhai Chhotalal Patel by purshis at Exh.5 in Civil Suit No. 4039 of 1987, the defendant adopted as his written statement the exceptions taken by him against the grant of

probate in Civil Misc. Application No. 637 of 1985. It is to be noted that earlier the plaintiff preferred the Civil Misc. Application No. 637 of 1985 for probate, however, the same was converted into Civil Suit No. 4039 of 1987. It was submitted by the defendant that the suit Will is false and fabricated and it is got up with the help of the plaintiff's father named, Jayantilal. It was also further contended that the deceased was not the sole owner of the house being tenement No. 7-A situated in Brahmakshatriya Co-operative Housing Society Ltd. According to him, he was the one half owner of the suit property. It was also further submitted that the deceased was his sister and was a destitute widow and on her death, he has become the owner of the other half of the suit house by succession to her estate and therefore, it was requested to reject the prayer of the plaintiff for grant of probate with respect to the suit Will. The defendant also resisted the Civil Suit No. 1516 of 1985 by filing the written statement at Exh.18. He challenged the

legality and validity of the suit Will. It was contended that the suit Will is got up by the plaintiff, with the help of her father, named, Jayantilal and one Bhanuprasad and several other persons in collusion with each other. He has also reiterated what was stated in the Civil Suit No. 4039 of 1987. So far as Civil Suit No. 4156 of 1985, which can said to be a counter suit, is concerned, the same was resisted by the plaintiff by filing written statement at Exh.21 and she ascertained her right to all the properties left behind by the deceased Vidyaben as her sole legatee named in the suit Will.

5. The learned trial Court raised the issues at Exh.34 in Civil Suit No.4039 of 1987, at Exh.28 in Civil Suit No. 1516 of 1985 and at Exh.26 in Civil Suit No. 4156 of 1985. The evidence came to be recorded in Civil Suit No. 4039 of 1987. The plaintiff examined herself at Exh.36 and five witnesses named, Manubhai Jabalji Barot at Exh.55 (attesting witness), Bhanuprasad Manilal Brahmbhatt at Exh.56 (attesting witness),

Jayantilal Muljibhai Parikh at Exh.60, Jagdish Jayantilal Nirmal at Exh.61 and Kanaiyalal Hargovinddas Dave at Exh.70. The defendant examined himself at Exh.118. Both the sides also produced certain documentary evidence. After appreciation of the evidence, oral as well as documentary, the learned trial Court held that the plaintiff proved that the suit Will (Exh.57) executed by deceased Vidyaben on 20th October, 1983 was legal and valid and that the defendant had failed to prove that he was the co-owner with respect to the suit house and having his half undivided share therein. The learned trial Court also held that the defendant failed to prove that he had been in possession of the suit house as alleged. The learned trial Court also further held that the plaintiff – Urvashiben Jayantilal Jagirdar became the absolute owner of the suit house by virtue of the Will executed by the deceased Vidyaben on 20th October, 1983 and accordingly, decreed the Civil Suit No. 4039 of 1987 as well as Civil Suit No. 1516 of 1985 and consequently, dismissed the Civil Suit No. 4156

of 1985. The learned trial Court ordered to issue probate to the plaintiff with respect to the suit Will (Exh.57). The learned trial Court also further passed a decree of permanent injunction restraining the defendant from disturbing or interfering in any manner with the plaintiff's possession on the suit house. Being aggrieved and dissatisfied with the common judgment and decree passed by the learned City Civil Court, Ahmedabad, dated 30/31st January, 1989, the defendant – Manubhai Chhotalal Patel has preferred all these three First Appeals.

6. Shri Chetan Pandya, learned advocate appearing on behalf of the appellant – original defendant, has submitted that the alleged suit Will (Exh.57) itself is under challenge and the said Will was not genuine and/or was under coercion. It was submitted that both the attesting witnesses (Exhs.55 & 56) were the relatives of the plaintiff and the contention on behalf of the plaintiff that the relation between the defendant and the deceased were not cordial, are

not borne out from the record. It is submitted that therefore, when the suspicion has been created, it is for the plaintiff to prove the genuineness of the Will. He has further submitted that the learned Trial Court has materially erred in holding that the suit Will alleged to have been executed by deceased Vidyaben on 20th October, 1983 was legal and valid. He has also further submitted that the learned trial Court has materially erred in holding that the appellant was not co-owner of the suit house and not having half undivided share therein. It is submitted that as the learned trial Court found that there are certain discrepancies in the evidence of the witnesses at Exhs.55 & 56 (attesting witnesses), the learned trial Court ought to have held that the Will is not proved and therefore, ought not to have issued the probate in favour of the respondent. He has further submitted that considering the evidence of the witness at Exh.55 as a whole, the learned trial Court ought to have held that the suit Will in question is

not proved. It is further submitted that when both the attesting witnesses were the relatives of the plaintiff, they were interested in favour of the plaintiff and therefore, the learned trial Court has erred in relying upon the evidences at Exhs.55 and 56 (attesting witnesses). It is also further submitted that the execution of the suit Will (Exh.57) was surrounded by suspicious circumstances and the suspicion has not been dispelled by cogent and convincing evidence on the part of the plaintiff and that non-mentioning of the name of the appellant, who was the elder brother of the deceased Vidyaben, in the suit Will, clearly shows that the execution and making of the suit Will was unnatural. It is, therefore, submitted that the learned trial Court has materially erred in holding the suit Will legal and valid. He has relied upon the judgment of the Hon'ble Supreme Court in case of ***Daulat Ram And Others V/s. Sodha And Others*** reported in **(2005) 1 SCC P-40,** more particularly, Para – 10 of the said judgment and relying upon the said decision, it

is submitted by him that when there are suspicious circumstances, the onus is on the propounder to remove the suspicion by leading appropriate evidence. He has also further submitted that the learned trial Court has erred in holding that the relationship between the deceased and the appellant has become estrange after the marriage of the deceased out side the caste. It is submitted that considering the evidence on record, the learned trial Court ought to have held that the relation between the deceased and the appellant was quite cordial and normal. It is submitted that there was ulterior motive on the part of the plaintiff in not mentioning the name of the appellant as next keen of deceased. It is submitted that the learned trial Court has materially erred in holding that there was nothing unnatural in the conduct of the deceased in not bequeathing any property to the appellant i.e real brother. It is also further submitted that no reason has been mentioned in the suit Will (Exh.57) for revoking the earlier Will dated 22nd December,

1960 by which, the properties were bequeathed in favour of the appellant and therefore, it is requested to allow the present appeals by quashing and setting the judgment and decree passed in Civil Suit Nos.4039 of 1987 and 1516 of 1985 and in dismissing the Civil Suit No.4156 of 1985.

7. On the other hand, Shri M.C.Shah, learned advocate appearing on behalf of the respondent herein – original plaintiff, has submitted that there are no suspicious circumstances at all. It is submitted that the testator was a widow, who was the Principal in the school and she was not a layman. It is also further submitted by him that the suit Will was executed in the year 1983 and the same was registered Will and the testator died in the year 1985 i.e after a period of about one and a half year and therefore, it cannot be said that the same was in suspicious circumstances. It is also further submitted by him that the attesting witnesses were not only the relatives of the plaintiff but

they were the relatives of the deceased Vidyaben also and it is not unnatural that for attesting the Will, the relatives and/or known person is called. It is submitted that merely because the relatives have signed as an attesting witnesses, the Will does not become suspicious. It is also further submitted that merely because the witnesses are relatives of the plaintiff, is no ground to hold the Will suspicious. It is also further submitted that even during her life time, the name of the plaintiff was nominated so far as the suit house is concerned, which shows the intention of the testator. It is, therefore, requested to dismiss all the appeals.

8. Heard the learned advocates appearing on behalf of the parties.

9. At the outset it is required to be noted that the testator was not a layman, she was a Principal in the school. It is also required to be noted that the testator was Patel by caste and the defendant was the elder brother of the

deceased. The testator, however, married to a man belonging to the Brahmbhatt caste (out of caste) sometime in 1940 and prior to that, she joined municipal service as a Teacher in 1939. She retired from service sometime in 1977 as a Principal of the primary school. All throughout her life after marriage, she resided in the suit house. She lost her husband after about two years from her marriage and no child was born out of their wedlock. She lived practically lonely life in the suit house till her death. It is the contention on behalf of the defendant – appellant herein that earlier one Will was executed by the deceased in the year 1960 by which, the properties were bequeathed in favour of the appellant, however, no such Will has come on record. It is the contention on behalf of the appellant that there is no reason given in the subsequent Will dated 20th October, 1983 for revoking the earlier Will dated 22nd December, 1960. Apart from the fact that the alleged Will dated 22nd December, 1960 is not on record, if a testator has changed his mind during the life

time, he or she is not required to give the reason. However, this is not relevant as the defendant has failed to establish that there was any earlier Will dated 22nd December, 1960.

10. So far as contention on behalf of the appellant that the suit Will is suspicious one and that the attesting witnesses were the relatives of the plaintiff and they were interested in favour of the plaintiff is concerned, it is required to be noted that even the attesting witnesses (Exhs. 56 & 57) were the relatives of the deceased also. It is but natural that for the purpose of attesting the Will, either relatives and/or known persons are called. There is nothing unnatural in attesting witness being relatives. Merely because, the attesting witnesses are the relatives, the suit Will will not become suspicious. The attesting witnesses were thoroughly cross-examined and except certain minor discrepancies, they can be said to be reliable witnesses. It is required to be noted that the suit Will is registered before

the Sub-Registrar. It is also required to be noted that the suit Will was executed in the year 1983 and the testator died in the year 1985 i.e after a period of about one and a half year. The submission on behalf of the appellant to hold that the suit Will was suspicious is on the basis that the attesting witnesses were the relatives and that though the appellant is real brother, properties are not bequeathed to him and it is given to the outsider. Looking to the circumstances stated hereinabove that she has married in out caste, she was residing separately and lonely after marriage and considering the aforesaid facts, if a testator takes decision not to bequeath her property to her brother, who has not taken her care, than there is nothing unnatural. It is the desire of the testator, which is required to be considered. Under the circumstances, merely because, the properties are not bequeathed to the appellant, who is the real brother, the Will will not become suspicious. One another aspect is also required to be considered that during

the life time, the deceased nominated the name of the plaintiff so far as suit house is concerned and this shows the clear intention on the part of the testator to give the property to the plaintiff. Considering the depositions of the attesting witnesses; the Will being registered one, which was executed prior to one and a half year of the death of the deceased testator; the relations between the testator and the appellant; the intention of the testator during her life time to nominate the name of the plaintiff, it cannot be said that the Will was executed in suspicious manner and/or by coercion. The plaintiff has become successful in proving the Will (Exh.57) and the learned trial Court has not committed any error in holding that the plaintiff has proved the suit Will to be legal and valid. In the facts and circumstances of the case, the decision of the Hon'ble Supreme Court in case of ***Daulat Ram And Others*** (Supra) will not be of any assistance to the appellant. The learned trial Court was justified in ordering to issue probate in favour

of the plaintiff and in holding that the plaintiff has become the absolute owner of the suit house by virtue of the suit Will (Exh.57). It is required to be noted that the plaintiff was not a totally stranger and it has come on evidence that she was treated by the deceased as she was her child and deceased was well educated woman, who was a Teacher and as stated hereinabove, during her life time, she took a decision to nominate her name so far as the suit house is concerned. As stated hereinabove, this is a clear indication of the intention of the deceased during her life time. No illegality has been committed by the learned trial Court in decreeing the suit of the plaintiff's and in dismissing the suit of the defendant – appellant herein.

11. For the reasons stated above, all the three appeals must fail and they are required to be dismissed and are accordingly dismissed. Ad-interim relief, if any, stands vacated

forthwith. However, there shall be no order as to costs.

[M.R.SHAH, J.]

kdc.